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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 549

AMERICAN PROCESSING & SALES COMPANY,
PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court did not promulgate a written opinion in this case.[1] The opinion of the Circuit Court of Appeals (R. 40–46) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1947. (R. 47.)

[1] The findings of fact and conclusions of law by the District Court are set forth at pages 24–26 of the record.

The petition for a writ of certiorari was filed on January 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In the statutory merger of two corporations, whereby the assets of the merging corporation were transferred to the surviving corporation and stock in the surviving corporation was issued directly to the stockholders of the merging corporation, is there a taxable transfer of the right to receive stock by the merging corporation to its stockholders within the meaning of Section 1802 (b) of the Internal Revenue Code?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 1800. IMPOSITION OF TAX.
>
> There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.
>
> (26 U. S. C. 1940 ed., Sec. 1800.)

SEC. 1802. CAPITAL STOCK (AND SIMILAR INTERESTS).

* * * * *

(b) [as amended by Section 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 209 of the First Revenue Act of 1940, c. 419, 54 Stat. 516, and Section 521 (a) (5) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Sales and Transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 5 cents * * *.

(26 U. S. C. 1940 ed., Sec. 1802.)

STATEMENT

The facts in this case were stipulated by the parties. (R. 13–21.) The findings of fact of the District Court (R. 24–25) follow the stipula-

tion. The facts may be summarized as follows (R. 13–21, 24–25):

In 1943 Rapid Roller Company, the merging corporation, was merged under the laws of Illinois with Hawthorn-Mellody Farms Dairy, Inc., the surviving corporation, whose name was changed to American Processing & Sales Company. (R. 13–14.) Under the articles of merger all property, real, personal, and mixed, belonging to the merging corporation was deemed to have been transferred to and vested in the surviving corporation without further act or deed, although the merging corporation agreed to execute such confirmatory deeds as might be deemed appropriate. (R. 15–16.)

The merging corporation had outstanding 5,405 shares of stock which were to be surrendered, and there were to be issued to the holders of those shares, pro rata, 1,500 shares of the preferred stock and 3,800 shares of common stock of the surviving corporation. (R. 16–17.)

On April 21, 1945, the Commissioner of Internal Revenue made an assessment of tax against the taxpayer in the amount of $265, after a revenue agent had recommended the assessment on the ground that the merging corporation transferred to its stockholders the right to receive the stock that was issued to them by the surviving corporation, and that this transfer was taxable within the meaning of Section 1802 (b) of the Internal Revenue Code. After notice and demand

the taxpayer paid the tax to the Collector and later filed a claim for refund. (R. 21, 25.)

The claim was rejected by the Commissioner of Internal Revenue (R. 21, 25) and the taxpayer filed this action against the Collector. The case was tried without a jury; the court decided in favor of the taxpayer without writing a formal opinion. (R. 22.) However, the District Court made findings of fact and conclusions of law. (R. 24–26.) The Collector appealed to the court below (R. 30–31) which reversed the decision of the District Court, with Judge Lindley dissenting (R. 40–47).

ARGUMENT

The court below correctly decided that the present case is controlled by the decision of this Court in *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60. The precise point at issue is whether in the case of a statutory merger, whereby stock of the surviving corporation (the taxpayer) was issued directly to the stockholders of the merging corporation, there was a taxable transfer of the right to receive such stock by the merging corporation to its stockholders within the meaning of Section 1802 (b) of the Internal Revenue Code, as amended, *supra.* While the *Raybestos-Manhattan* case did not involve a statutory merger, but a consolidation by the transfer of assets of two constituent corporations to a newly formed corporation in exchange for the latter's

stock, the reasoning of the case applies with equal force in the instant case.

In the *Raybestos-Manhattan* case this Court explained that the right of the stockholders of the constituent corporations to receive the newly issued shares of the taxpayer resulted from the conveyance to it of the property of the constituent corporations, and that the new shares could not lawfully be issued to any other than the constituent corporations without their authority. In its opinion this Court said (p. 63):

> We think that this effective disposition of the right to receive the stock involved a taxable transfer quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. It is not doubted that there would have been a taxable transfer if each corporation had conveyed its property to petitioner in exchange for its shares of stock to be issued as the grantor might direct, and had later ordered the certificates to be issued to its stockholders. The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

In the present case, as in the *Raybestos-Manhattan* case, the generating source of the right of the stockholders of the merging corporation to receive the newly issued shares of the taxpayer was the conveyance to it of the property of the merging corporation. The Articles of Merger read in part (R. 15–16):

> All property, real, personal, and mixed, all receivables of whatever kind, all choses in action, and all and every other interest of or belonging or due to the merging corporation shall be taken and deemed to have been transferred to and vested in the surviving corporation without further act or deed, although the merging corporation shall execute such confirmatory deeds or other instruments as may be deemed appropriate.

Since, in both the instant case and the *Raybestos-Manhattan* case, one corporation conveyed all of its assets to another and this conveyance gave rise to the issuance of stock of the transferee corporation to the stockholders of the merging or disappearing corporation, the two cases are alike in principle. If there was a taxable transfer from the merging or constituent corporation to its stockholders of the right to receive stock in the surviving corporation within the meaning of Section 1802 (b) of the Internal Revenue Code or the corresponding provision of an earlier Revenue Act in the one case, there would seem to be such a taxable transfer in the other case. See M. T. 3, 1942–2 Cum. Bull. 257[2]; also *Emporium Cap-*

[2] This ruling was applied only from the date of its publication, and not retroactively. M. T. 17, 1943 Cum. Bull. 1166. Prior to the publication of M. T. 3, the Commissioner as a matter of practice had not sought to impose a tax upon the transfer by the merging corporation of the right to receive stock of the new company in the case of statutory mergers or consolidations. The Treasury Regulations have

well Co. v. *Anglim,* 140 F. 2d 224 (C. C. A. 9th), certiorari denied, 322 U. S. 752, and *United States* v. *Niagara Hudson Power Corp.,* 53 F. Supp. 796 (S. D. N. Y.).

The taxpayer argues that the merging corporation did not acquire the right to receive any stock in the surviving corporation, and that there could not have been a transfer of such a right to its stockholders. (Br. 11–16.) The dissenting opinion rests largely upon the same ground. (R. 44–46.) The basis of this argument is that under the laws of Illinois the merging corporation ceased to exist at the time of the merger, and so could not have received the stock of the surviving corporation and could not have transferred it to others. In another case involving the application of the stamp tax on transfers of stock, *Founders General Co.* v. *Hoey,* 300 U. S. 268, this Court said (p. 275): "* * * we are not to look beyond the Act for further criteria of taxability." Otherwise there would not be a uniform application of the statute. See also *Cliffs Corp.* v. *United States,* 103 F. 2d 77, 80 (C. C. A. 6th), certiorari

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never covered the precise question, thus leaving the matter open. See Treasury Regulations 71 (Revised July, 1932), Art. 35 (e), and Treasury Regulations 71 (1941 ed.), Sec. 113.34 (i). While the court below inadvertently said in its opinion that the Regulations were amended (R. 44) to accord with the Bureau's decision that the statute authorized the taxation of the "merger situation," the reference should have been to the ruling, M. T. 3.

denied, 308 U. S. 575; *Weil* v. *United States,* 115 F. 2d 999, 1002 (C. C. A. 2d), certiorari denied, 313 U. S. 574. The taxpayer relies upon the decision of this Court in *Helvering* v. *Metro. Edison Co.,* 306 U. S. 522 (Br. 13); but that case did not involve a stamp tax on a transfer of stock or of the right to receive stock.

The taxpayer also argues that prior to 1941 the Treasury Regulations provided that such a transfer as that in the instant case was exempt, and implies that the Regulations could not have been changed without a statutory enactment. (Br. 17–21.) Since the transaction in this case took place in 1943, the Regulations promulgated in 1941 apply and the power of the Commissioner to issue those Regulations is beyond question. *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 100. Furthermore, the taxpayer has misconstrued the Regulations in effect prior to 1941. Both the Regulations prior to 1941 and the Regulations as amended in 1941 were intended to exempt from tax only the transaction whereby the stockholder in the merging corporation *surrenders* his stock in that corporation, and not to the transfer of the stock in the surviving corporation to the stockholders in the merging corporation. The purpose of the amendment made to the Regulations in 1941 was merely to clarify the old Regulations, not to change them.

CONCLUSION

The decision of the court below is correct, and is controlled in principle by a decision of this Court. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
SEWALL KEY,
LEE A. JACKSON,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

FEBRUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948